No. [redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1958

RUDOLF IVANOVICH ABEL, ALSO KNOWN AS "MARK" AND ALSO KNOWN AS MARTIN COLLINS AND EMIL R. GOLDFUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
J. WALTER YEAGLEY,
Acting Assistant Attorney General,
WILLIAM F. TOMPKINS,
Special Assistant to the Attorney General,
KEVIN T. MARONEY,
ANTHONY A. AMBROSIO,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

492101—58——1

CITATIONS

Cases:

Statutes and rules:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 263

RUDOLF IVANOVICH ABEL, ALSO KNOWN AS "MARK" AND ALSO KNOWN AS MARTIN COLLINS AND EMIL R. GOLDFUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 837–865) is reported at 258 F. 2d 485. The opinion of the District Court denying petitioner's pre-trial motion to suppress evidence (R. 239–246) is reported at 155 F. Supp. 8.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1958 (R. 865). The petition for a writ of certiorari was filed on August 8, 1958, and was granted on October 13, 1958, limited to the first two questions presented by the petition for the writ (R.

866). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

This Court's order granting the writ of certiorari (R. 866) limited the questions to be considered to the first and second questions as presented by the petition, namely:

"1. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated by a search and the seizure of evidence without a search warrant, after an alien suspected and officially accused of espionage has been taken into custody for deportation, pursuant to an administrative Immigration Service warrant, but has not been arrested for the commission of a crime?

"2. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated when articles so seized are unrelated to the Immigration Service warrant and, together with other articles obtained from such leads, are introduced as evidence in a prosecution for espionage?"

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Fourth and Fifth Amendments to the Constitution of the United States and the text of 18 U. S. C. 793, 794, 951 and 371 are set forth in Appendix A to petitioner's brief (Br. 32–37). The pertinent provisions of 8 U. S. C. 1103 (a), 8 U. S. C. 1251 (a) (5), 8 U. S. C. 1252 (a), 8 U. S. C. 1305, 8 U. S. C. 1306, and 8 C. F. R. 242.2 (a), are set forth in the Appendix, *infra*, pp. 62–64.

STATEMENT

On August 7, 1957, the petitioner was indicted on three counts charging him with having conspired, from about 1948 to the date of the indictment, (1) to communicate and transmit to the Union of Soviet Socialist Republics information relating to the national defense of the United States (conspiracy to violate 18 U. S. C. 794 (a)), (2) to obtain documents and other materials connected with the national defense of the United States for the purpose of transmitting such documents to the U. S. S. R. (conspiracy to violate 18 U. S. C. 793), and (3) to act in the United States as an agent of the U. S. S. R. without prior notification to the Secretary of State (conspiracy to violate 18 U. S. C. 951) (R. 7–19).[1]

Prior to trial on the indictment, which was returned in the Eastern District of New York, the petitioner moved in the Southern District of New York to suppress evidence seized from his hotel room on the date of his arrest (R. 20–55). On motion of the government, the petitioner's motion to suppress evidence was dismissed by the District Court for the Southern District of New York, with leave to petitioner to file the motion in the Eastern District, the District of trial (R. 239). Copies of all pleadings and affidavits which had been filed in the Southern district of trial (R. 239). Copies of all pleadings deemed to have been filed in that court. Additional affidavits were submitted and a hearing on the motion

[1] 18 U. S. C. 794 and 793 each has its own conspiracy provision. Conspiracy to violate 18 U. S. C. 951 is punishable under the general conspiracy statute, 18 U. S. C. 371.

to suppress was held (R. 79–238). The motion was denied (R. 239–246).

The petitioner was then tried before a jury, convicted on all three counts, and on November 15, 1957, sentenced to a total of thirty years imprisonment and to pay a fine of $3,000 (R. 5–6). The conviction was affirmed by the Court of Appeals (R. 865).

BACKGROUND OF ARREST AND SEARCH

In May, 1957, Reino Hayhanen, who since 1954 had been petitioner's assistant in Soviet espionage work in the United States (R. 290, 377–380) and who was at that time a Lieutenant Colonel in the Soviet State Security Service (NKVD) (R. 457–458) defected from the Soviet espionage apparatus by going into the American Embassy in Paris, France, and offering to furnish information, which he then did (R. 439–444). Within a few days, Hayhanen returned to the United States (R. 444) and the FBI immediately conducted an intensive investigation of the espionage activities of the petitioner (who was known then only by the cryptonym "Mark") (R. 56–57). FBI agents searched, with his consent, Hayhanen's home in Peekskill, New York, uncovering considerable corroborative evidence of espionage on the part of Hayhanen and the petitioner, including a microfilmed message received by the petitioner from his Soviet superiors in connection with his instructions to locate an American Army Sergeant who had been compromised while in Moscow and had furnished information to the Soviets (Exs. 18, 45, 46; R. 508, 515–516, 394–395, 528–530, 536–537); the agents also un-

covered from what Hayhanen had described as a secret "drop" in Prospect Park, in Brooklyn, a typewritten message concealed in a hollowed-out screw container (Exs. 5, 65, 66; R. 582–588).[2]

FBI agents also undertook a surveillance of the petitioner's studio in Room 505 of 252 Fulton Street, Brooklyn, New York, observing him enter and leave the room during hours close to midnight on May 23 and June 13, 1957 (R. 644–647). Many other details of the investigation conducted prior to the petitioner's arrest by I. N. S. officers on June 21 are disclosed by the record in this case.

The evidence developed during the course of this investigation was submitted to and reviewed by attorneys of the Internal Security Division of the Department of Justice and the conclusion was reached that the petitioner had conspired to violate the espionage statutes. Following this determination, two Justice Department attorneys interviewed the principal witness in the case on June 18 and 19, 1957. Although this witness (Hayhanen) had already furnished and was willing to continue to furnish, on a confidential basis, information to be used by the United States Government for intelligence purposes, he absolutely refused to agree to testify in any public proceeding for fear of reprisals that he claimed would be taken by the U. S. S. R. against his mother, brothers and sister, who at that time were, and presumably still are,

[2] This message read: "Nobody came to meeting either 8th or 9th at 203 2030 as I was advised he should. Why? Should he be inside or outside? Is time wrong? Place seems right. Please check."

in the Soviet Union (R. 57). Hayhanen was a co-conspirator of the petitioner, and was so named in the indictment (R. 7–19). Because of Hayhanen's absolute refusal to testify as to his espionage activities in a public proceeding, which because he was a co-conspirator would be upheld under the Fifth Amendment, the Internal Security Division concluded on June 19, 1957, that the evidence then available was insufficient to secure a warrant on complaint or to secure an indictment on charges of conspiracy to violate the espionage statutes (R. 57).

If Hayhanen had not been adamant in his refusal to testify publicly as of that time, the Internal Security Division and the Federal Bureau of Investigation were prepared, and fully intended, on June 19, 1957, to initiate the necessary legal steps to secure a warrant and effect the arrest of the petitioner on espionage charges (R. 57). However, on that date, the Department of Justice, with information that a Soviet national was in the United States illegally and was heading up a Soviet espionage apparatus, was unable to proceed under the espionage statutes for the reason given. The Department could proceed under the immigration laws (*ibid*). An administrative warrant for the arrest of an alien under 8 U. S. C. 1252 and an order to show cause why he should not be deported (R. 33, 34–36) were duly issued by the Acting District Director of the Immigration and Naturalization Service, New York City, on June 20, 1957, and the petitioner was arrested the next day.

Following the petitioner's indictment on espionage charges in August, 1957, and the subsequent filing by

him of the motion to suppress, both parties submitted affidavits concerning certain factual issues raised by the motion and a hearing was thereafter held thereon before District Judge Byers of the District Court for the Eastern District of New York on October 8 and 9, 1957 (R. 4, 79–238). The petitioner's argument that his motion should be granted was based on two grounds, which were stated by Judge Byers in his opinion denying the motion, as follows (R. 242–243; 155 F. Supp. 8, 10):

> (1) The search incidental to his arrest was illegal since a deportation proceeding is not criminal in nature.
>
> (2) If the foregoing is decided against him, that the search should be deemed to be illegal and not made in good faith, for the reason that the Department of Justice used the deportation procedure and the incidental arrest in bad faith; that the ultimate purpose was to secure evidence as the result of a search which could be used in a prosecution for the alleged violation of our espionage laws, although at the time that the arrest and search took place, the Department was not in a legal position to institute a criminal prosecution based upon the alleged violation of the espionage statutes.

The taking of testimony on the motion commenced on October 8, 1957, and consumed the better part of two days. The petitioner called as witnesses three of the four arresting officers, one FBI agent, and an immigration official who had authorized proceeding pursuant to 8 U. S. C. 1252 (a).

EVIDENCE ON THE MOTION TO SUPPRESS

The evidence presented at the hearing as supplemented by testimony given at the trial established the following:

On or about June 13, 1957, Sam Papich, the FBI liaison officer with the Immigration and Naturalization Service (R. 159, 198–199), informed Mario T. Noto, the Deputy Assistant Commissioner for Special Investigations of the I. N. S. (R. 91, 198), in the latter's offices, that the FBI had information concerning an alien then in the United States who had illegally entered this country from Canada and who was in possession of fraudulent documents purporting to evidence American citizenship (R. 199). Papich further told Noto that the FBI had considerable information that the suspect was engaged in espionage (R. 199–200). Noto asked Papich for additional details concerning the suspect's illegal entry and status in the United States, and Papich told Noto that he would attempt to get the information (R. 200). Papich gave Noto no further information concerning the suspect's espionage activities and Noto "didn't ask him any questions with respect to that, because my interest from a jurisdictional viewpoint is confined to the illegal status which he had in the United States" (R. 200; see also R. 202). Papich did not indicate to Noto what action he desired the latter to take concerning the information (R. 200); and Noto did not indicate to Papich that he would take no action until hearing further from Papich (R. 202). No arrangements were made for Noto to confer further with the FBI (R. 202).

Following his conversation with Papich, Noto had a search of I. N. S. records made for any available information pertaining to an individual known by any of the names by which Papich had referred to the suspect (R. 201–202, 214). On June 18, 19, or 20, 1957, Papich gave Noto additional information concerning the case, including all the names and aliases used by the suspect; he told him that the suspect had used a birth certificate under an assumed name, that he had entered the United States from Canada, that he had admitted to various persons that he was in the United States illegally, that he held some kind of rank in the Soviet espionage apparatus, and that he had engaged in espionage (R. 203–204).

After Noto received this additional information, he had a brief conversation with General Swing, the Commissioner of the I. N. S., during which Noto told General Swing that in his opinion the I. N. S. "had a case—an immigration case—on Mr. Abel for illegal entry" (R. 203). Noto further told General Swing, who had not previously known of the case, that he "proposed to place Mr. Abel under deportation proceedings, and I also acquainted him with the—slightly—with the background—that is, the matters relating to espionage activities" (R. 203).

On June 19th or 20th, after receiving the information from Papich and discussing the matter with General Swing, Noto had a conversation at the FBI offices with two officers of the FBI named Moore and Latranto (R. 203–205). This conversation further confirmed what had been told Noto by Papich (R.

205–206). The FBI did not tell Noto when to arrest petitioner (R. 207). Noto told Moore and Latranto that he "would determine very shortly as to whether or not I would order that Mr. Abel be apprehended for immigration purposes" (R. 207). As he left, or shortly after the meeting, Noto told Moore and Latranto that he had determined that he had enough evidence on which to order Abel's arrest on charges of "having failed to notify the Attorney General of his address in the United States as required by the Immigration and Nationality Act which makes it a deportable offense" (R. 207; see also R. 210). Noto also said that he "was going to act on it quickly" (R. 208).

On June 20, 1957, at approximately 3 p. m., Noto informed Robert Schoenenberger, a supervisory investigator in the Washington office of the I. N. S., who was directly under Noto (R. 91–92), and Lennox Kanzler, a divisional investigator in the I. N. S. Washington office who was directly under Schoenenberger (R. 157–158), that the FBI had information that a colonel in the Russian Secret Service was illegally in the United States and was also suspected of espionage (R. 92, 158). Neither Schoenenberger nor Kanzler had ever heard of the case before that day (R. 117, 158). Noto instructed Schoenenberger and Kanzler to accompany him to the offices of the FBI (R. 158). There, in the late afternoon, they met with several members of the FBI, including Papich (R. 158–160). The FBI personnel told the three I. N. S. investigators that the FBI had information which might be of interest to the I. N. S., and which the I. N. S. was free to use, concerning "an alien who

had illegally entered the United States" and who was living in New York City under the name of Martin Collins or Emil Goldfus (R. 160–161). They further said that the suspect was believed to be a Russian colonel engaged in espionage (R. 161), and they gave the I. N. S. personnel a report describing this "person who had entered the United States illegally in 1949 from Canada at an unknown port" (R. 125, 131–132, 161, 213).

After reviewing the information which they received from the FBI, Noto, Schoenenberger, and Kanzler concluded that they had sufficient information to draw up, in the name of "Martin Collins," an order to show cause why the recipient should not be deported and an I. N. S. administrative arrest warrant (R. 33–37, 106–108, 115). Noto instructed Kanzler to draw up these documents (R. 163–164, 216). The preparation of these instructions was carried out entirely on the initiative of the three I. N. S. personnel (R. 96, 163), since, as Schoenenberger testified, no instructions were necessary once they had received information sufficient to satisfy them that a person was illegally in the country (R. 96). The decision to institute deportation proceedings rather than charge petitioner with a crime[3] was made by Noto alone after discussion of the matter within the I. N. S. (R. 217–218, 220, 223–224).

[3] It appeared that petitioner had failed to notify the Attorney General of his address as required by law (8 U. S. C. 1305). Failure to do so is a criminal offense (8 U. S. C. 1306) in addition to rendering the alien deportable on that ground alone (8 U. S. C. 1254 (a) (5)). See R. 35.

Noto told Schoenenberger and Kanzler to go to New York to supervise the apprehension of the person alleged to be illegally in the country (R. 91–92, 165, 211). Noto instructed Schoenenberger to convey the information which they had concerning the petitioner to John Murff, the New York Acting District Director of the I. N. S., to have Murff sign the arrest warrant and order to show cause, and to arrest the petitioner as early as possible the next morning (R. 211, 213). Noto "told him that in the interest of coordination, in view of Mr. Abel's background, that when he arrived in New York after his conversations with the District Director, that I would appreciate it if he would get in touch with the New York office of the F. B. I." (R. 211; see also R. 164–165, 212). The F. B. I. did not request this procedure (R. 212). Noto called the New York office of the I. N. S. to tell them Schoenenberger was coming, so that Murff would be available to confer with Schoenenberger (R. 215). Noto did not talk with the New York office of the FBI (R. 215).

Schoenenberger and Kanzler arrived at the Newark airport at 10:30 p. m., on June 20th. There they were met by I. N. S. Investigators Edward J. Farley and Edward Boyle of the New York office of the I. N. S. (R. 93–94, 123–124). Schoenenberger instructed Farley to drive them to the New York office of the I. N. S. (R. 95, 124). On the ride from the airport, Schoenenberger and Kanzler told Farley and Boyle "that there was an alien illegally in the United States, whom the FBI had been investigating and that we were to make an arrest of this particular person" (R.

124–125). After arriving at the New York office Schoenenberger discussed the case with Acting District Director Murff (R. 95). After Murff reviewed the information and agreed that there was a sufficient basis to issue a show cause order and warrant of arrest, he and Schoenenberger concluded that the documents should be immediately issued and served on the petitioner (R. 95, 108). At approximately midnight, accordingly, Murff signed the order to show cause and the arrest warrant which Schoenenberger had brought from Washington (R. 96, 108). After the documents were thus completed, Schoenenberger discussed with Murff, Farley, Kanzler, and Boyle the question of when the documents would be served on the petitioner (R. 96).

In the early morning of June 21, 1957, *i. e.*, just after midnight, Schoenenberger, Kanzler, Farley, and Boyle left the New York offices of the I. N. S. to go to the New York offices of the FBI, where Schoenenberger talked to six or eight FBI agents concerning how the I. N. S. could locate and identify the suspect (R. 97–100, 134–135, 137). One of the FBI agents asked Schoenenberger to give the FBI the opportunity to interview the suspect before the arrest in order to ascertain whether he would "cooperate" (R. 97, 98–99, 140). Schoenenberger agreed (R. 98–99), and they made arrangements for the arrest (R. 100, 136, 140, 148). Schoenenberger designated Investigators Farley and Boyle to stand by during the FBI's interview of the suspect (R. 102). Farley and Boyle were never instructed what they should do if the

suspect "cooperated," nor were they given any indication that their instructions to make the arrest were on a contingent basis (R. 140, 148).

The four I. N. S. officials spent the remaining few hours of the night at the FBI headquarters, where sleeping facilities were provided (R. 100, 137). At approximately 6:30 a. m., Schoenenberger, accompanied by two FBI agents, left for the Hotel Latham, where the arrest was to be made (R. 100). They arrived at the hotel at approximately 7 a. m. (R. 101). For the next half hour, by prearrangement, they cruised about the area, and at 7:30 a. m. they entered the hotel (R. 101).

Shortly before 7 a. m., investigators Farley and Boyle likewise left the FBI headquarters and proceeded to the Hotel Latham, where they had been instructed to meet certain agents of the FBI (R. 137). At the hotel, shortly after 7 a. m., they met FBI agents Gamber, Blasco, Phelan, Green, and one or two others (R. 101, 137–138). Green and another FBI agent, accompanied by Farley and Boyle, went to Room 841 of the hotel, which was a short distance down the corridor from Room 839, the room occupied by the petitioner (R. 137–138). Farley and Boyle, who had the show cause order and the warrant of arrest, waited in Room 841 for the FBI's interview with the petitioner to be concluded (R. 138).

Agents Gamber and Blasco had been instructed by their superior in the FBI to knock on the door of Room 839 as near to 7 a. m. as possible and to attempt to interview the occupant with a view to "solicit[ing] his cooperation regarding his background

and also about activities of his in the United States" (R. 175; see also R. 241). At 7:02 a. m., Gamber knocked on the door (R. 175, 241). When the petitioner opened the door a little, Gamber, followed by Blasco, pushed it open wider and walked into the room (R. 175). The room was a small single hotel room, approximately twelve feet by eight feet in size, with an adjoining bathroom (R. 140). Gamber and Blasco showed the petitioner their credentials and told him orally that they were agents of the FBI (R. 177). He was at that time naked, but he partially dressed within a few minutes (R. 176–177). Several minutes later, FBI agent Phelan entered the room and showed the petitioner his credentials (R. 177, 241).

Gamber told petitioner that the FBI was charged with the responsibility of investigating matters pertaining to the internal security of the United States, and that the agents wished to talk to him concerning such a matter (R. 179–180, 241). The petitioner made no reply (R. 180). Gamber asked the petitioner his name, and he replied "Martin Collins" (R. 180, 241). Gamber then asked his birthdate and the petitioner "muttered June 15, July 15, and did not indicate the year of his birth" (R. 180, 241). After being given his false teeth he replied "July 15, 1897" (R. 180, 241). When he was asked why he said both "June 15" and "July 15", he said nothing (R. 180, 241). In response to other questions, the petitioner said that he was born in New York City and lived in room 839 (R. 180, 241). He did not answer questions about how long he had lived at the Hotel Latham and where he had lived previously (R. 180–181, 241).

He was then asked the name of his mother, her maiden name, whether he was employed, when he was last employed, the name of his father, whether he had any brothers or sisters, whether he had any relatives in the United States, and where he had resided most of his life (R. 180, 241–242). He gave answers to some of the questions, and remained silent as to others (R. 180–181, 241–242). No other questions were asked (R. 182). The agents told the petitioner that the FBI had information that he had been involved in espionage (R. 183–184). The petitioner was told, on three or four occasions, that the agents desired that he "cooperate" by answering the questions which he had declined to answer, and he was told that, if he did not do so, he would be arrested before he left the room (R. 181–183, 184, 242). The agents did not indicate to him what would happen if he "cooperated" (R. 184). Blasco had been instructed that, in the event that the petitioner "cooperated", he or Gamber was to call his immediate superior at the New York office of the FBI and relate the "degree of cooperation" which the petitioner exhibited (R. 184–185). Gamber and Blasco had been instructed that, if the petitioner did not cooperate, they were to have agent Phelan, who had been in the room during most of the interview, summon "the I. N. S. investigators who were present in the hotel to Room 839 to effect the arrest warrant of Collins" (R. 185, 191). The I. N. S. investigators' instructions to arrest the petitioner were not, as previously noted, on a contingent basis (R. 140, 148).

At approximately 7:25 a. m., after talking to the petitioner for a little less than half an hour, Gamber

and Blasco decided to have Phelan call the I. N. S. investigators to effect the petitioner's arrest (R. 189–190). Phelan went to the door of Room 841 and motioned to Farley and Boyle that the interview had been completed and that they could make the arrest (R. 138, 139–140, 242). After entering the petitioner's room with Farley, Boyle, after identifying the person in the room as "Martin Collins", served him with the arrest warrant (R. 33, 54 67, 189). Boyle then read to the petitioner a portion of the Order to Show Cause and asked him to sign it—which the petitioner did (R. 34–37, 53–54, 67–68, 140–141, 189–190). Boyle then advised the petitioner that he had a right to counsel (R. 189).

At approximately 7:30 a. m., Schoenenberger and Kanzler entered the hotel and went directly to the petitioner's room (R. 65, 68, 101, 142, 165, 662). Farley, Boyle and the petitioner were in the room, Gamber was leaving the room (R. 102, 151, 702), and Blasco had moved to the rear of the room, where he remained for twelve to fifteen minutes. (R. 190–191.) Schoenenberger, accompanied by Kanzler, entered the room in order to supervise the taking of the petitioner into custody and the examination of "his personal effects in an effort to locate documentary evidence of alienage" (R. 65, 102).

After ascertaining that the petitioner had no weapon on his person with which to harm either himself or the arresting officers, Farley asked the petitioner, who was in his undershorts, to get dressed, and inquired whether he wanted to wear any particular suit (R. 68, 141, 242). The petitioner pointed

to a particular suit hanging in the closet; after searching the suit for weapons and documents relating to alienage, Farley handed it to him (R. 68, 141). The undershirt he selected was similarly searched and handed to him (R. 68, 141).

Schoenenberger, Kanzler, Farley, and Boyle then made a search of the room and its contents in an effort, according to Farley, to find "nationality documents" or "weapons" (R. 141; see also R. 68, 150). According to Kanzler, the officers were looking for "evidence of identity, alienage and nationality" (R. 166). This search took fifteen or twenty minutes (R. 142, 147). Schoenenberger then asked the petitioner whether he wanted to take his personal effects with him (R. 109). The petitioner replied that he did "with some reservations" (R. 109). Schoenenberger, Farley, Boyle, and Kanzler then assisted the petitioner in the packing of his belongings; in doing so, they searched his baggage for "any dangerous weapons" and, in addition, according to Schoenenberger, they "made a superficial search for evidence of alienage" (R. 65, 109). Farley testified that he was "definitely not" instructed to search for evidence of espionage (R. 151). No FBI agent participated in the search, nor was any agent consulted during the search (R. 113, 143–144, 151, 192–193). Nor, with the exception of Blasco, who remained in the room during part of the search, was any FBI agent even present in the room during the search (R. 113, 143, 151, 169, 190–191). Agent Gamber, however, remained in the corridor during the search, near the doorway to the

room, where he was later joined by Biasco when the latter left the room (R. 142–143, 169, 190).

After the petitioner's baggage had all been packed, he asked to repack one of the larger bags (R. 65, 68–69, 109, 112). While the petitioner was repacking the bag, Schoenenberger noticed that he was attempting to slip some papers into his right sleeve (R. 65, 109, 665). Schoenenberger took the petitioner's hand and removed three pieces of paper (R. 65, 110, 665).[4]

During the packing, the petitioner was allowed to choose—and did choose—what he wanted to take with him and what he wanted to leave behind (R. 109, 112). He discarded certain items, including some jars of painter's supplies which were on the window sill and which he stated he would leave since he did not want them (R. 69, 109, 663). He also discarded into the wastebasket a handful of pencils, a couple of packages of Kleenex, and several other articles (R. 109, 114, 663).

During the packing, Kanzler questioned the petitioner about "what he wanted done about his hotel room" (R. 167). The petitioner asked where he was to be taken and he was told that he was to be taken to the New York offices of the I. N. S. (R. 167). According to Kanzler, "after he [petitioner] learned that, he said, "Well, I guess I might as well check out of the hotel.'" (R. 167).

Farley asked the petitioner how much he owed the hotel, and the petitioner answered "$21" (R. 69, 144, 191–192). Farley called the desk clerk on the room

[4] One of these, a numerical code message, was received in evidence at the trial (Ex. 77, R. 665–666).

telephone extension and asked him to prepare the petitioner's bill (R. 146). The bill was brought up to the room by one of the FBI agents who were waiting nearby and handed to the petitioner; the petitioner gave the necessary money to Farley, who in turn gave it to the agent; the agent then took the money to the desk, where the bill was paid and receipted (R. 69, 70, 144–146).[5] The amount of the bill was $25.20, which paid for the room through the previous night of June 20th[6] (R. 236, 660). According to the manager of the hotel, the petitioner would have been entitled, without further payment, to keep the room until check-out time on June 21st, which was 3 p. m. (R. 659–660). However, as the manager further testified, "if the key is turned in and the baggage is taken out [before check-out time], the room is given up" (R. 660) and the guest is no longer entitled to the use of or access to the room (R. 659–660), which is then available to be rented to someone else (R. 661).

At approximately 8:30 a. m., Schoenenberger, Kanzler, Farley, and Boyle left the hotel with the petitioner and his personal effects, entered an I. N. S. automobile, and drove to the New York offices of the I. N. S. (R. 59–60, 69–70, 108–109, 113, 147, 242, 663, 705). There the I. N. S. arresting officers conducted a more thorough search of the petitioner's effects (R.

[5] The petitioner had been allowed to keep all the money that was in the room at the time of the search (R. 145).

[6] The room rental was $4 per day (plus tax), which the petitioner paid, in arrears, on a weekly basis (R. 659). On the preceding Saturday, June 15th, the petitioner had paid $29.40 for the previous week (R. 659). Thus, on Friday, June 21st, the petitioner owed six days' rent (R. 659).

59–60). All but about sixteen items were tendered back to the petitioner prior to the hearing, but were refused because of the "storage problem." (R. 79.)

Immediately after the petitioner and the I. N. S. officials left the hotel, FBI agent Kehoe communicated with the hotel manager, Nat Wilson (R. 70, 694). Wilson told Kehoe that the petitioner "had checked out of the hotel and had paid his bill in full" (R. 70, 658). At the request of Kehoe, Wilson executed a written "Consent to Search" Room 839 (R. 70, 658). At about 9:15 a. m., after Wilson personally inspected Room 839 from the doorway to make certain that the petitioner had vacated it (R. 70–71), Kehoe and several other FBI agents began to search the room, which no one had entered after the petitioner's departure (R. 706), and they completed the search at approximately 12:15 p. m. (R. 51, 71, 703–704, 706). The agents seized all articles found in the wastebasket which was full (R. 694).

At 4:15 p. m. the same day, June 21, 1957, the petitioner was taken by plane to the Alien Detention Facility at McAllen, Texas (R. 58, 60). On June 23rd and 24th, he was questioned at McAllen by FBI agents (R. 60–61). On June 24th, and again on June 27th, during the hearing on the deportation charge, the petitioner admitted that his true name was Rudolph Ivanovich Abel, that he was a citizen of Russia, and that he had entered the United States illegally (R. 49, 61–62, 690–693).

SEIZED ITEMS INTRODUCED IN EVIDENCE

The Government offered in evidence at the trial only seven of the items which were found in Room 839 of the Hotel Latham (R. 661–671, 693–695, 724, 726). These consisted of: (1) a fictitious birth certificate in the name of "Martin Collins"[1] (Ex. 78); (2) a spurious birth certificate in the name of "Emil Goldfus"[2] (Ex. 79); (3) an International Certificate of Vaccination dated May 23, 1957, in the name of Martin Collins, evidencing that "Collins" was vaccinated by Dr. Samuel Groopman on May 21, 1957 (Ex. 80; R. 39, 49, 599, 669–671); (4) a bank book issued by the East River Savings Bank, New York City, in the name of E. R. Goldfus (Ex. 81; R. 45, 84, 671–672); (5) a strip of graph paper containing a coded message in 78 groups of digits, with five digits to the group (Ex. 77; R.

[1] The "Collins" certificate bore the number 32024, and purported to have been issued by New York County. It stated that "Collins" was born on July 2, 1897 (R. 45, 667). The records of the New York County Health Department show that birth certificate No. 32024 for the year 1897 recorded the birth of one Esther Wohman (Ex. 84; R. 681–682). The Department of Health could find no record of the birth of a Martin Collins in 1897 (R. 684–685). Frederick E. Webb, a handwriting expert (R. 525–526), testified that the certificate in the name of Martin Collins contained a forged signature and other writing which attempted to duplicate the writing of a person who filled out such certificates (R. 717–719).

[2] The "Goldfus" certificate states that "Goldfus" was born on August 2, 1902, at 120 East 87th Street, the son of Emil Goldfus and Helen Trautwein, who were both born in Germany (R. 45, 85–86, 669, 680–681). A death certificate issued by the New York City Department of Health shows that an Emil Goldfus, of 120 East 87th Street, the son of Emil Goldfus and Helen Trautwein, who were both born in Germany, died on October 9, 1903 (Ex. 83; R. 48–49, 678–681).

38, 49, 665–666); (6) a piece of wood, wrapped in sandpaper, containing a cipher pad[9] (Ex. 88; R. 693–695); and (7) a hollowed-out wooden pencil containing microfilm (Ex. 87).[10] The first four items were found during the search of the petitioner's room and his personal effects (R. 666–671). The fifth item was one of the three papers taken from the petitioner when he tried to put them up his sleeve (R. 65, 109, 665). The last two items were found in the wastebasket in the search of the vacant room after the petitioner had checked out of the hotel (R. 51, 694, 724, 726).

SUMMARY OF ARGUMENT

I

The government supports the legality of the search and seizure in this case on the ground that a search of

[9] The FBI Laboratory's examination of this block of wood disclosed that it came apart and that inside it, rolled in thin paper and sealed with adhesive tape, was a small booklet of about 250 pages. On each page there appears a series of numbers in five-digit groups. In one section the numbers are printed in red, in another in black (R. 723–726).

[10] The FBI Laboratory's examination of this pencil revealed that the eraser end was removable and the pencil itself hollow. In the pencil were 18 frames of microfilm (Ex. 97), one of which was a radio receiving schedule in the Russian language (Ex. 98), and another of which (Ex. 98–A) consisted of a letter in English addressed "Dear Dad" (R. 726–731). The pencil also contained other microfilmed letters in English and in Russian (Defense Ex. F; R. 734).

At the request of the Department of Justice, the Department of Defense instituted a radio monitoring operation at the times and on frequencies indicated on the radio schedule found in the pencil. As a result of the monitoring, on July 15 and August 4, 1957, coded messages in five-digit blocks were intercepted (Ex. 100; R. 746–753).

the person of an individual arrested, and of his immediate surroundings, is permissible as an incident of the arrest, and that items discovered in that search which would be the proper objects of a search warrant may be seized. These propositions are well established with respect to arrests in criminal cases. *Weeks* v. *United States,* 232 U. S. 383; *Harris* v. *United States,* 331 U. S. 145; *United States* v. *Rabinowitz,* 339 U. S. 56.

Under these holdings the legality of the search depends on the legality of the arrest. The petitioner here raises for the first time the legality of arrests under immigration warrants on the ground that they do not meet the conditions imposed by the Fourth Amendment on arrest warrants in criminal cases. But deportation proceedings have often been held by this Court not to be criminal cases. *Bilokumsky* v. *Tod,* 263 U. S. 149; *Carlson* v. *Landon,* 342 U. S. 524; *Harisiades* v. *Shaughnessy,* 342 U. S. 580. The use of administrative warrants in deportation cases has long received the tacit approval of the Court and in *Carlson* v. *Landon, supra,* the Court specifically upheld detention initiated by an immigration warrant and considered the nature of the warrant in some detail. What is essential to the validity of such an arrest is the very same factor which is controlling in passing upon the due process of deportation proceedings. The proceedings must be fair and give the alien an opportunity to defend his rights. But it is not necessary to engraft criminal procedures on what are concededly administrative proceedings.

The central question in this case is whether the rule permitting limited searches and seizures as incident to legal arrests should be considered applicable in deportation proceedings. The basis for the rule in criminal cases was to make the arresting power effective by protecting officers from injury by concealed weapons and to prevent escapes. Thus, the right to search does not depend on the nature of the proceeding, but on the right of the officer to take the person into custody and to hold him. That the power to search is not dependent on the warrant in a criminal case is demonstrated by the fact that, where it is legal to make an arrest without a warrant of any kind, the right of limited search has been upheld. *Carroll* v. *United States*, 267 U. S. 132; *Agnello* v. *United States*, 269 U. S. 20. There is equal necessity of permitting a reasonable search in deportation cases; the need is the same to protect the arresting officers and to prevent escapes.

The holdings that immigration proceedings are not criminal were made to explain the absence of the need for jury trial and of other rights guaranteed to defendants in criminal cases. It would be anomalous if these holdings were the basis for granting greater rights under the Fourth Amendment than are extended in criminal cases themselves.

The decisions of the two lower courts in this case that the search was legal and the evidence admissible is in accord with the only precedents in the field. *Diogo* v. *Holland*, 243 F. 2d 571 (C. A. 3); *DaCruz* v. *Holland*, 241 F. 2d 118 (C. A. 3); *Tsimounis* v. *Holland*, 132 F. Supp. 754 (E. D. Pa.), affirmed, 228 F.

2d 907 (C. A. 3); *Taylor* v. *Fine*, 115 F. Supp. 68 (S. D. Calif.). Assuming that the arrest is legal, immigration officers should be given the same right as other arresting officers to search the persons and immediate surroundings of the individuals arrested.

II

(*a*) The trial court's finding that the I. N. S. officers acted in good faith in conducting the search is supported by the record and should be accepted as conclusive. *Davis* v. *United States*, 328 U. S. 582, 593; *Harris* v. *United States*, 331 U. S. 145, 153. The evidence adduced below was uncontradicted that the search was conducted by I. N. S. officers and not by the F. B. I. The decision to arrest the petitioner on an immigration charge, and when to make the arrest, was made entirely by officials of I. N. S. Nor do the circumstances of admitted cooperation between the I. N. S. and FBI, or the alleged attempt of the FBI to enlist the petitioner in counter-espionage activities, serve to substantiate the petitioner's charge that the purpose of the I. N. S. search was to discover evidence of espionage. These two branches of the Department of Justice have not only the authority, but the duty, to cooperate in providing each other with information helpful in carrying out their respective duties. Moreover, the trial court found that the F. B. I. had not attempted to enlist the petitioner in counter-espionage activities, and that the cooperation solicited by the agents of petitioner was merely in answering their questions. In any event, even if the FBI had in fact sought to induce petitioner to become a counter-spy, this circumstance would not serve to negate the trial

court's finding of good faith. The burden of proof is on the party challenging the legality of a search and seizure to show that it was illegal. *Lotto* v. *United States*, 157 F. 2d 623, 626 (C. A. 8), certiorari denied, 330 U. S. 811; *Schnitzer* v. *United States*, 77 F. 2d 233, 235 (C. A. 8). The petitioner has failed to carry the burden on this case.

(*b*) The petitioner, having failed in the trial court to challenge the reasonableness of the seizure because of the quantity of the items seized, may not raise that issue initially in this Court. *United States* v. *Jones*, 204 F. 2d 745 (C. A. 7), certiorari denied, 346 U. S. 854; *Rodriguez* v. *United States*, 80 F. 2d 646 (C. A. 5). Actually, the issue was not only not raised; it was removed from consideration by stipulation. To permit the petitioner to raise this issue now in this Court would unfairly deprive the Government of an opportunity to respond. Cf. *Giordenello* v. *United States*, 357 U. S. 480, 488. Moreover, assuming the validity of the petitioner's claim, his failure to raise it before or during the trial deprived the trial court of the opportunity of avoiding the alleged error by suppressing the evidence sought to be introduced.

In any event, the record does not support the petitioner's contention that there was a general seizure of his property which would contravene this Court's decision in *Kremen* v. *United States*, 353 U. S. 346. The decision to give up the hotel room, following his arrest by I. N. S., to take his belongings with him and to abandon certain items, was made by the petitioner—*not* the I. N. S. officers. The removal of all of his belongings with him from the hotel room by the I. N. S.

officers, therefore, was not a "general seizure" of the type found in the *Kremen* case to be prohibited by the Fourth Amendment.

(*c*) Only seven of the items found in the petitioner's hotel room were introduced in evidence at the trial. Two birth certificates, an international certificate of vaccination, and a bankbook in the names of either Martin Collins or Robert Goldfus were properly seized by I. N. S. officers as an incident to the arrest because these documents were used by the petitioner to conceal his true identity and nationality and thus constituted the means and instrumentalities by which he continued to preserve the concealment of his initial illegal entry into the country and his continued illicit status herein. Cf. *Harris* v. *United States*, *supra*, 331 U. S. at 153, 154; *Agnello* v. *United States*, 269 U. S. 20, 30. The seizure of a code message which was taken from the petitioner by an I. N. S. officer when he tried secretly to conceal it up his sleeve was justified on two grounds. First, an arresting officer may search an arrested person to prevent the destruction of evidence. *Davis* v. *United States*, 328 U. S. 582, 609; *United States* v. *Rabinowitz*, 339 U. S. 56, 72. Secondly, the message appeared on its face to be an instrumentality of the crime of conspiracy to commit espionage and thus was properly subject to seizure since this Court has held that, where a search is conducted in good faith, officers need not ignore material related to crimes other than the one for which the person is being arrested, if the arresting officers come upon such material during the course of their search.

Harris v. *United States*, 331 U. S. at 153–155. The remaining two items (a cipher book and a hollowed-out pencil containing microfilm) were seized by FBI agents during a search conducted, with the consent of the hotel management, after the petitioner had vacated his room. The petitioner had previously thrown these items into a wastebasket (with the apparent intent of abandoning them) during the packing of his belongings, following his arrest. Since the petitioner had vacated the room when the search was conducted, and since the hotel management consented to the search, it was a legal one. *Davis* v. *United States, supra*, 328 U. S. at 593–594. Moreover, the petitioner has no standing to object to the seizure of these objects since he had clearly abandoned them by throwing them into a wastebasket. *Hester* v. *United States*, 265 U. S. 57; *Haerr* v. *United States*, 240 F. 2d 533, 535 (C. A. 5).

ARGUMENT

The basic proposition upon which the United States supports the legality of the search and seizure in this case is that when a legal arrest occurs it is not unconstitutional to make an appropriate search without a warrant of the person, and immediate surroundings, of the individual arrested, as an incident of the arrest, and also to seize articles which could be seized if the search were made pursuant to a warrant. This contention is founded on the decisions of this Court which firmly establish that very proposition with reference to searches incident to arrest in criminal cases. *Weeks* v. *United States*, 232 U. S. 383, 392; *Harris* v. *United States*, 331 U. S. 145; *United States* v. *Rabinowitz*,

339 U. S. 56. The central question here is whether the same rule applies when an arrest is made pursuant to an Immigration and Naturalization Service warrant in a deportation case. This problem we discuss in Point I, *infra*.

The petitioner also seeks to raise peripheral questions: (1) whether the search was made in good faith as an incident of the arrest; (2) whether the seizure was unreasonable; and (3) whether the items introduced in evidence were the proper subject of seizure. These issues are discussed in Point II, *infra*.

I

OFFICERS OF THE IMMIGRATION AND NATURALIZATION SERVICE ARE AUTHORIZED, AS AN INCIDENT TO AN ARREST UNDER A VALID IMMIGRATION ARREST WARRANT, TO SEARCH THE PERSON AND IMMEDIATE SURROUNDINGS OF THE PERSON ARRESTED

A. ARREST PURSUANT TO AN ADMINISTRATIVE WARRANT IN A DEPORTATION PROCEEDING IS NOT ILLEGAL

If the arrest itself was illegal, then it is obvious that it is not possible to support upon it the legality of the search. *Giordenello* v. *United States*, 357 U. S. 480. As a preliminary matter, it is, therefore, necessary to examine the petitioner's argument (Br. 26–31), advanced here for the first time,[11] that the arrest itself

[11] Not only did the petitioner not urge illegality of the arrest as a ground for his motion to suppress, but, in arguing the motion, it was specifically conceded that the arrest was legal. R. 126–128. The petitioner did not assert illegality of the arrest in the court below and did not refer to it in his petition for certiorari here. It may well be that under these circumstances the Court will not wish to consider the issue as before it. Cf. *Giordenello* v. *United States*, 357 U. S. 480, 488; see *infra*, pp. 49–52.

was illegal because the warrant was not issued under the procedure prescribed by the Fourth Amendment.

With respect to the legality of the arrest, it is not argued that the issuance of the warrant was unauthorized by the statute (8 U. S. C. 1252, Appendix, *infra*, p. 63) or failed to comply with the Immigration and Naturalization Service regulations (8 C. F. R. 242.2 (a), Appendix, *infra*, pp. 63–64). The acting district director who signed the warrant exercised an informed judgment on the basis of detailed and reliable information indicating that probable cause for the deportation of the petitioner existed.[12] The warrant and the order to show cause why the petitioner should not be deported appear to be in proper form (R. 33–37) and were served on the petitioner at the time of his arrest (R. 140–141, 189). The petitioner's present attack on the arrest is that the statute and regulations could not constitutionally authorize administrative arrest warrants; in his view, the Constitution requires that, even in deportation cases, warrants for arrest be judicial warrants issued on the

[12] As is set forth more fully in the Statement, *supra*, pp. 8–13, the Immigration and Naturalization Service had before it detailed information from the statements of the petitioner's associate Hayhanen, which had been confirmed by an investigation by the FBI, that the petitioner was a deportable alien. This information was laid before Acting District Director Murff by Robert Schoenenberger, a supervisory investigator in the Washington office (R. 95, 107–108). After reviewing the information, Murff concluded that there was sufficient basis for the issuance of an order to show cause and a warrant of arrest, and accordingly he signed those documents (R. 95, 96, 108). The information relied on by Murff which had been received from the FBI is part of the record in this Court under seal (R. 236–238).

basis of sworn testimony as is required in criminal cases by the Fourth Amendment.[13]

This Court has specifically held that deportation proceedings are not criminal in nature and that the constitutional rights guaranteed defendants in criminal cases are not applicable to aliens in deportation cases. *E. g., Bilokumsky* v. *Tod,* 263 U. S. 149; *Carlson* v. *Landon,* 342 U. S. 524; *Harisiades* v. *Shaughnessy,* 342 U. S. 580. These cases are based on the inherent nature of a deportation proceeding; the purpose is not to punish an alien, but physically to return him to his native land if his presence here has been determined by Congress to be undesirable. *Wong Wing* v. *United States,* 163 U. S. 228. Obviously, an alien cannot be physically removed from this country unless he is taken into custody—that is, arrested. While the procedures to be followed in these proceedings must be reasonable and must afford him an opportunity for a fair hearing, they are not the procedures required for a criminal trial.

Although this Court has not previously been asked to rule specifically on the application of the Fourth Amendment to warrants for arrest in deportation cases, it has for many years consistently upheld deportation proceedings which were in fact initiated in this manner (as were almost all deportation proceed-

[13] Insofar as there is an implication that the arrest was not a *bona fide* step in effecting the deportation of the petitioner, the issue is merely a variant of the argument that the search of the petitioner's room was not an incident of the arrest, but was to support a criminal case for espionage. This argument is answered below, *infra,* pp. 39–47.

ings until recent years). *E. g., The Japanese Immigrant Case*, 189 U. S. 86, 97–99; *Bilokumsky* v. *Tod*, 263 U. S. 149; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Galvan* v. *Press*, 347 U. S. 522. And in *Carlson* v. *Landon*, 342 U. S. 524, the Court specifically upheld the legality of holding an alien in custody pending deportation, although again the order taking him into custody was an administrative order rather than a criminal arrest warrant. However important it is to protect aliens from arbitrary action, there is no need to require that protections peculiar to the criminal law be engrafted on to the authorized administrative procedures long followed by the Immigration and Naturalization Service. Cf. *The Japanese Immigrant Case*, 189 U. S. 86; *Wong Yang Sung* v. *McGrath*, 339 U. S. 33.

Since the practice of using administrative arrest warrants in deportation cases is not intrinsically unfair and since Congress's authorization of the procedure has for a long time had at least the tacit approval of this Court, the petitioner has a heavy burden to overturn the long-established practice. We urge that he has not met that burden.

B. THE ESTABLISHED RULE PERMITTING THE SEARCH OF A PERSON LEGALLY ARRESTED AND OF HIS IMMEDIATE SURROUNDINGS SHOULD BE APPLIED TO AN ARREST PURSUANT TO A VALID IMMIGRATION WARRANT EXECUTED IN A DEPORTATION PROCEEDING

The fundamental basis for permitting a limited search without a search warrant in connection with a legal arrest is to make the arrest effective and to pro-

tect the officers from injury. Thus this Court stated in *Agnello* v. *United States*, 269 U. S. 20 at 30:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States*, 232 U. S. 383, 392.

If officers are to hold a person in custody, it is essential that they ascert whether he has arms on his person or within easy reach. And such a search being not only appropriate, but absolutely necessary, it was an easy step to hold that officers are not required to overlook or discard contraband, the fruits of crime, or the means by which it is effected, when they are so discovered.[14] In applying this rule, the Court has sanctioned the search of an area certainly as large as, and sometimes much larger than, the twelve by eight foot hotel room and adjoining bath here involved (R.

---

[14] This view is comparable to the rule that when officers are merely attempting to execute an arrest, rather than making a search as such, and happen upon contraband, it may be seized. *Love* v. *United States*, 170 F. 2d 32 (C. A. 4), certiorari denied, 336 U. S. 912; *United States* v. *Joines*, 258 F. 2d 471 (C. A. 3), certiorari denied, November 10, 1958, No. 360, this Term. *Marron* v. *United States*, 275 U. S. 192, is also comparable. There, officers making a search pursuant to a warrant came upon seizable articles not included in the warrant. The right to seize those articles was upheld.

140). *Marron* v. *United States*, 275 U. S. 192; *Harris* v. *United States*, 331 U. S. 145; *United States* v. *Rabinowitz*, 339 U. S. 56.

In emphasizing that the cases upholding such a search are limited to criminal cases, the petitioner overlooks the fact that the language of the holdings clearly indicates that it is not the nature of the proceeding which justifies the search without a warrant, but the fact that the officers are lawfully on the premises engaged in a lawful activity. The evidence is admissible because it is discovered in the course of a legal arrest. In *Weeks* v. *United States*, 232 U. S. 383, 392, the Court found that English and American law has always recognized:

> * * * the right on the part of the Government * * * to search the person * * * when *legally* arrested to discover and seize the fruits or evidences of crime. [Emphasis added.]

In *Harris* v. *United States, supra*, at 150–151, the Court in the same vein pointed out:

> Search and seizure incident to *lawful* arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States * * *. [Emphasis added.]

And, in *United States* v. *Rabinowitz*, 339 U. S. 56, it was said at 60:

> Yet no one questions the right, without a search warrant, to search the person after a *valid* arrest. * * * Where one has been placed in the custody of the law by *valid* action of officers, it was not unreasonable to search him. [Emphasis added.]

The fact that the right to search in connection with an arrest does not arise from the arrest *warrant* is made very clear by the fact that where it is legal to make an arrest without a warrant, as where a felony is in progress, the incidental search has been upheld. *Carroll* v. *United States*, 267 U. S. 132, 158; *Agnello* v. *United States*, 269 U. S. 20, 30; cf. *Marron* v. *United States*, 275 U. S. 192. It is the legality of the arrest, not the authority given by the arrest warrant, that is important. The converse of the situation arose last term when the Court held evidence inadmissible which had been seized in the course of a search made as an incident to an arrest pursuant to an arrest warrant, but where the arrest was illegal because there was not sufficient basis for a finding of probable cause to support the warrant. *Giordenello* v. *United States*, 357 U. S. 480.

If the right of search exists when there is no warrant at all but the arrest is for other reasons legal, it would seem to follow that the limited search here involved should be upheld where a warrant has been issued in an administrative proceeding. The distinctions which the courts have drawn between deportation proceedings and criminal cases have been made in order to explain limitations on rights which would exist if the proceedings were criminal. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 594 (*ex post facto* clause inapplicable); *Carlson* v. *Landon*, 342 U. S. 524, 537 (no right to trial by jury). It would be anomalous to deduce from these cases that aliens arrested under immigration warrants have greater

rights under the Fourth Amendment than persons arrested on criminal charges.

Actually, the basis for upholding a search in deportation cases is precisely the same as that for upholding it in criminal cases. In order to make the arrest effective, to prevent escapes, and to safeguard the arresting officers, it is necessary that they make sure that the person arrested does not have available weapons or devices which would aid an escape. And it is equally reasonable that the officers should retain seizable items which turn up in such a search. The legality of the search should depend, as in criminal cases, on the legality of the arrest.

Both courts below decided in favor of the admissibility of the evidence on the same theory we advance. The trial court stated (R. 243):

> * * * however I can think of no reason why a search made in connection with such an arrest as this should be regarded as any less valid than one based upon an arrest made in a proposed criminal cause.

And in its opinion the court below stated (R. 849):

> With these similarities in mind, there would appear to be no basis for distinguishing between the right of government agents to conduct a search incident to a lawful arrest for commission of a crime and their right to conduct a search incident to a lawful arrest in connection with deportation proceedings. The grounds of public policy and convenience which justify the former are no less strong in the case of the latter.

The only other federal courts which have considered the power of Immigration and Naturalization Service agents to conduct a search incident to a lawful arrest in a deportation proceeding have recognized such power. In *Diogo* v. *Holland,* 243 F. 2d 571, and *DaCruz* v. *Holland,* 241 F. 2d 118, the Third Circuit, in *per curiam* orders, held that such searches were lawful and the evidence admissible. Earlier, the same court had affirmed without opinion a holding by the District Court that a search of the person of an alien arrested for deportation was legal. *Tsimounis* v. *Holland,* 132 F. Supp. 754 (E. D. Pa.), affirmed, 228 F. 2d 907. And in *Taylor* v. *Finc,* 115 F. Supp. 68, 70, n. 1 (S. D. Calif.), the court declared that "Incidental to a legal arrest whether with or without a warrant, the officers [I. N. S. agents] may conduct a reasonable incidental search."

For these reasons, we urge the Court not to hamper, and perhaps endanger, immigration agents in the course of their duties by restricting their right to act as other arresting officers do by making a search of the persons they arrest and the immediate surroundings.

II

THE SEARCHES OF THE PETITIONER'S HOTEL ROOM AND THE SEIZURE OF CERTAIN OBJECTS FOUND THEREIN WERE LAWFUL. CONSEQUENTLY, THE ADMISSION IN EVIDENCE OF CERTAIN OF THE SEIZED ITEMS WAS PROPER

A. THE TRIAL COURT'S FINDING THAT IN CONDUCTING THE SEARCH THE ARRESTING I. N. S. OFFICERS ACTED IN GOOD FAITH, WHICH FINDING WAS AFFIRMED BY THE COURT OF APPEALS, IS SUPPORTED BY THE RECORD, IS NOT CLEARLY ERRONEOUS, AND SHOULD BE ACCEPTED

The petitioner urges that "The evidence is overwhelming that the true objective of the search in the instant case was to uncover evidence of espionage, under the guise of a warrant of arrest pending deportation proceedings." (Br. 22.) "The Government cannot possibly claim" he says, "that FBI agents were seeking evidence of petitioner's status as a deportable alien" (*ibid.*).

But the evidence is uncontradicted that the search which was conducted incident to the petitioner's arrest was conducted by I. N. S. officers, not the FBI,[15] and the I. N. S. officers testified, without contradiction, that the object of their search was the discovery (in

[15] The mere fact that FBI officers *were present* during the search did not, of course, despite the petitioner's argument to the contrary (Br. 22), convert what was otherwise an I. N. S. search into an FBI search. It is true that the subsequent search of the petitioner's hotel room, which was carried out *following* petitioner's checking out and the removal of him and his baggage to the New York headquarters of the I. N. S., was by the FBI, but that search, which was conducted with the consent of the hotel management, was not an incident to the petitioner's arrest and he has no standing to object thereto (see *infra*, pp. 58–60).

addition to weapons),[16] of documentary materials relating to the arrested person's identity and alienage (R. 65, 68, 102, 109–141, 150). The trial court, expressly addressing its attention to the requirement of "good faith" laid down in *Harris* v. *United States*, 331 U. S. 145, 153 (on which the petitioner so strongly relies, Br. 20–23), found that the search was carried out in good faith. 155 F. Supp. 8, 11. This finding was affirmed by the Court of Appeals after a "survey of the record", 258 F. 2d 485, 494–496. Unless it is so unsupported by the record that it is erroneous as a matter of law, such a finding should be accepted as conclusive. *Davis* v. *United States*, 328 U. S. 582, 593; *Harris* v. *United States*, *supra*, 331 U. S. at 153. Especially is this true since the finding was made after an extensive pre-trial hearing at which the petitioner had the opportunity of calling whatever witnesses he desired from the FBI and I. N. S. (see R. 170–172), and at which he himself, if he had chosen to do so, was, of course, at liberty to testify. Even more than in the case of most findings of fact, a finding on good faith depends on an evaluation by the fact-finder of the credibility of the witnesses.

Moreover, the record reflects all of the elements of good faith noted in the *Harris* case, *supra*, at 153–154—*i. e.*, the search was not a general exploration but was specifically directed to the means and instrumentalities by which the petitioner had affected his illegal entry into the country and continued his illicit status here thereafter; the search which fol-

[16] The officers' search for weapons was clearly proper. See *Harris* v. *United States*, 331 U. S. 145, 154.

lowed the arrest was appropriate for the discovery of such materials; there was nothing in the agents' conduct which was inconsistent with their declared purpose; and the objects sought for and those actually discovered were properly subject to seizure. See the summary of the facts in the Statement, *supra*, pp. 17–19; see also, *infra*, pp. 55–58. In addition, the evidence presented at the pre-trial hearing showed that, after receiving information from the FBI concerning the petitioner's alienage and deportable status, officials of the I. N. S. decided to issue a warrant for his arrest, further decided when they would make the arrest, and then proceeded to make the arrest and the search incident thereto, without participation therein by any FBI agent."

The petitioner's contentions are based primarily on the admitted cooperation between the I. N. S. and the FBI (Br. 15, 21–22) and his allegation that the FBI was attempting to enlist him in counter-espionage activities (Br. 11–13, 19). With regard to the

---

"The petitioner states (Br. 22) that the warrant "was served at their [the FBI's] direction". The evidence is perfectly clear, however, that this statement is true only in the sense that the FBI agents indicated to the I. N. S. officers that their interview with the petitioner in the hotel room had been concluded. The I. N. S., at the request of the FBI, had agreed to allow this interview before the I. N. S. arrested the petitioner (R. 97–99). This, however, was evidence of nothing other than the admittedly close cooperation which existed between I. N. S. and the FBI as each carried out its own special functions (see *infra*, pp. 41–42). The trial judge, on the basis of this evidence and the entire record before him, specifically found as a fact that the arrest was not made under the direction and supervision of the FBI (R. 244).

matter of cooperation, the FBI had, of course, the authority and even the duty as a law enforcement agency to give the I. N. S. the information it possessed concerning the petitioner's illegal entry and continued illicit status in this country, inasmuch as the enforcement of the immigration laws is peculiarly the concern of the I. N. S. The action of the I. N. S. in informing the FBI when the arrest would be made, and allowing the FBI to interview the petitioner before the arrest, shows only that the I. N. S. desired to avoid interfering with the FBI as each performed its proper functions. But the mere fact of such cooperation does not substantiate the petitioner's charge, in the face of the specific testimony to the contrary, that the purpose of the I. N. S. search was to discover evidence of espionage. As stated by the trial judge (155 F. Supp. at 11):

> No good reason has been suggested why these two branches of the Department of Justice should not cooperate, and that is the extent of the showing made on the part of the defendant.

See also the opinion of the Court of Appeals, 258 F. 2d 485, 495, n. 10.

With regard to the allegation that the FBI was attempting to enlist the petitioner in counter-intelligence activities, even were this the case the point would be completely irrelevant. The only issue here is whether the purpose of the I. N. S. search was to discover documentary materials relating to the petitioner's status as a deportable alien or to discover evidence of espionage. See 258 F. 2d at 494. There is no greater likelihood that the I. N. S. investigators

were searching for evidence of espionage if the FBI was hoping to enlist the petitioner in counter-espionage than if the FBI was merely investigating and seeking to uncover the full extent of his past espionage activities. In any event, the trial court found that the FBI had not attempted to enlist the petitioner in counter-espionage activities, 155 F. Supp. at 11. It is clear from the evidence (*ibid.*), and the trial court so found (155 F. Supp. at 10), that the cooperation solicited was merely in answering the agent's questions. Moreover, the instructions to the I. N. S. investigators for the arrest of the petitioner (R. 102, 138) were not contingent on whether the petitioner cooperated (R. 140, 148).

The petitioner argues that the administrative arrest warrant, pursuant to which his arrest was effected, was issued "at the request of the FBI" (Br. 21–22). He cites four record references as support for that statement—R. 75, 76, 163, 164. The latter two references are to the testimony of I. N. S. investigator Kanzler that he "drew up" the arrest warrant and show cause order pursuant to the instructions of Mr. Noto, the I. N. S. Deputy Assistant Commissioner for Special Investigations (R. 198). The only conceivable support for the petitioner's statement to be found on these two pages is Kanzler's testimony that the instructions referred to were given in the offices of the FBI (R. 163–164). But it is undisputed, as we have seen, that the I. N. S. and the FBI were in communication with each other regarding the petitioner prior to the latter's arrest, and that the two services cooperated closely with each other as each

carried out its own respective functions *vis-à-vis* the petitioner. Consequently, the fact that Mr. Noto's instructions to Mr. Kanzler were given in the FBI offices provides no support for the petitioner's assertion. Furthermore, there is an abundance of direct testimony to the effect that the decision to issue the warrant for the petitioner's arrest was the I. N. S.'s own (R. 95–96, 108, 163, 200, 203, 207, 217–218, 220, 223–224).

The first two references, *supra*—R. 75 and 76—are to a newspaper article which attributed to the I. N. S. Commissioner statements to the effect that the I. N. S. arrested the petitioner "at the specific request of 'several government agencies'" (R. 75) and that the petitioner would not have been arrested by the I. N. S. if "American counter-intelligence had not requested it" (R. 76). Though the article was published some two months prior to the hearing on the motion to suppress (R. 4, 75), the petitioner did not subpoena either the Commissioner or the author of the article to testify at the hearing, nor did he, in bringing the article to the attention of the court following the close of the hearing, request that the hearing be re-opened for the purpose of introducing testimony by either.[18] Under the

[18] The article was brought to the court's attention on October 11, 1957 (155 F. Supp. at 8, 12), two days following the close of the hearing (R. 4), by the petitioner's associate defense counsel, Mr. Fraiman, who stated in an affidavit (R. 74–75) executed the preceding day, October 10th, that he had learned on that day of General Swing's statement to the press of two months earlier (R. 74). The affidavit further stated that the author of the newspaper article had told the affiant that he was personally willing to sign an affidavit attesting to the truth and

circumstances, there was, as the Court of Appeals pointed out (258 F. 2d at 495), "no reason why the trial judge should have credited this multiple hearsay" contained in a newspaper article, as against the sworn testimony of the several I. N. S. officials, given at the hearing, concerning the circumstances leading up to the petitioner's arrest."[19]

The petitioner further contends (Br. 23–25) that the initial decision of the Department of Justice to proceed against him as a deportable alien under the immigration laws, rather than as a spy under the espionage statutes, and to effect his arrest under an administrative warrant, issued by and returnable to itself, was made to avoid public process. He thus claims that the search and seizure which followed the arrest was a "subterfuge", "equivalent to the use of clandestine stealth" (Br. 23).

His claim that the procedure utilized was done to avoid public process, however, is completely unsupported by the record. On the contrary, the reasons

---

accuracy of the article in reporting General Swing's statements but that counsel to the newspaper had refused to permit it as a matter of policy (R. 74). Mr. Fraiman further stated that the petitioner would have no objection to the Government's submitting an affidavit by General Swing "denying the truth of the quoted matter attributed to him" in the article, or to a government request that the hearing be reopened to have General Swing testify (R. 75).

[19] The trial court's opinion on the motion to suppress was delivered on October 11, 1957 (R. 4, 155 F. Supp. 8), the day on which Mr. Fraiman's affidavit was filed. The court, after acknowledging that the affidavit had been read and considered, stated that its contents did not, in the judgment of the court, "enhance the arguments for the defense" as previously set forth in the opinion (155 F. Supp. at 12).

why, on June 19, 1957, the Department of Justice had decided to proceed under the immigration laws rather than the espionage statutes are fully explained in an affidavit (R. 55–62) submitted by associate government counsel below, filed in opposition to the petitioner's motion to suppress and contrary to the petitioner's present contentions. The affidavit asserts that on June 18 and 19, 1957, two attorneys of the Internal Security Division of the Department of Justice interviewed the principal government witness in this case, who was a co-conspirator of petitioner and thus could invoke his privileges under the Fifth Amendment if called upon to testify against his will. At this time, the witness "absolutely refused" to testify in a public proceeding for fear of reprisals which he claimed would be taken by the U. S. S. R. against his family who were still living in that country (R. 57). Under these circumstances, the Internal Security Division concluded on June 19, 1957, that the available evidence was insufficient to proceed against the petitioner under the espionage statutes. It is stated unequivocally in the affidavit that "[h]ad the witness been willing to testify, the * * * [Department of Justice was] prepared as of June 19, 1957, and fully intended, to take the necessary legal steps to secure a warrant and effect the arrest of Petitioner on espionage charges" (*ibid.*). This assertion is uncontradicted by any evidence in the record. Moreover, the subsequent decision to proceed under the espionage statutes was made possible only after the belated decision of the previously reluctant witness to testify (R. 58). Under these circumstances, we submit that the procedure fol-

lowed in this case with respect to the petitioner's apprehension was not at all the "subterfuge" asserted by him.

The petitioner relies (Br. 23–24) on *Gouled* v. *United States*, 255 U. S. 298, but that case is clearly inapposite. There, the Court held that evidence obtained by stealth was equivalent to the obtaining of evidence by force and coercion and was likewise prohibited by the Fourth Amendment. The documents seized in *Gouled* were, in effect, stolen by an officer of the government. In contrast, the I. N. S. officers here entered the petitioner's hotel lawfully to arrest him under the authority of a valid immigration arrest warrant, and the search and seizures that ensued were an incident to a valid arrest.

The burden of proof is on the one challenging the legality of a search and seizure to show that an illegal search and seizure has occurred. *Lotto* v. *United States*, 157 F. 2d 623, 626 (C. A. 8), certiorari denied, 330 U. S. 811; *Schnitzer* v. *United States*, 77 F. 2d 233, 235 (C. A. 8); cf. *Nardone* v. *United States*, 308 U. S. 338, 341. We submit that the petitioner, on this record, has failed to carry that burden.

B. THE PETITIONER, HAVING FAILED TO OBJECT THAT THE SEIZURE WAS UNREASONABLE BECAUSE OF THE QUANTITY OF ITEMS TAKEN FROM HIS HOTEL ROOM FOLLOWING HIS ARREST, PRIOR TO OR AT THE TRIAL BELOW, MAY NOT RAISE THAT ISSUE INITIALLY BEFORE THIS COURT. IN ANY EVENT, THE RECORD ESTABLISHES THAT ONLY A LIMITED NUMBER OF ITEMS WERE ACTUALLY "SEIZED" BY THE I. N. S. OFFICERS

At the hearing on the motion to suppress made by the petitioner before trial, his objections to the search of his hotel room by officers of the I. N. S. on June 21,

1957 and the seizure of certain objects found therein were limited to (1) the alleged lack of authority of I. N. S. officers to conduct a search of the person, and the surrounding area under the control, of an individual arrested, as an incident to a valid arrest under an administrative immigration arrest warrant and (2) assuming the authority to search in these circumstances, that the *search* was unreasonable because it was conducted in bad faith—its true objective allegedly being to discover evidence of the petitioner's espionage activities and not material pertaining to the matters contained in the immigration warrant (R. 116, 125, 126–127, 128, 129–130, 152, 154, 171, 227; see also 155 F. Supp. 8, 10). No objection was raised by the petitioner at that time that the seizure was unreasonable because of the quantity of the items seized. Actually by stipulation the petitioner removed from consideration all but approximately 26 items (R. 79–90, 225–226).[20] Similarly, in his brief in the Court of Ap-

[20] At the commencement of the hearing on the motion to suppress, government counsel advised the court that the Government laid claim to only twenty-three items taken from petitioner's hotel room by I. N. S. agents (R. 80–82, 84–86). Moreover, though all of the items found in the hotel room were included in the petitioner's list of items "seized" (contained in Exhibits C and D to his affidavit in support of the motion to suppress (R. 37–46)), his counsel conceded at the hearing that many of the articles included therein were "wholly unrelated to the case" (R. 79) and that "there is no dispute between the government and ourselves" (R. 80) with respect to these items. The petitioner's counsel thereafter consented to have these items stricken from the motion by stipulation (R. 79–90) after the trial judge pointed out that "I want to make it quite clear that those undisputed items are not deemed to be embraced in the motion" (R. 80). The court's additional statements that

peals, though the petitioner argued (Brief of Appellant, pp. 13–14) that the "seizure was unreasonable, because the items seized did not relate to the immigration warrant which was the basis of the search" (*id.*, at 13), it is abundantly clear that his objection was limited to the items seized which were introduced in evidence at the trial and did not embrace the contention that all of his personal effects which were taken with him to I. N. S. headquarters after his arrest were "seized". Consequently, neither the trial court nor the Court of Appeals had an opportunity to decide the legality of the search and seizure on the basis of the scope of seizure. See 155 F. Supp. 8; 258 F. 2d 485, 492–497. In fact, both courts correctly assumed that the petitioner conceded that the seizure was a limited one. See 155 F. Supp. at 11–12; 258 F. 2d at 492, 495–497.

The petitioner now contends (Br. 25–26), for the first time, that the seizure was unreasonable because "[h]is living quarters were literally stripped of all he possessed", making scattered reference to the fact that all of his personal effects found in the hotel room, consisting of over 200 items, were "seized" (see Br. 6, 9, 16, 22, 25) in an attempt to raise the issue decided by this Court in *Kremen* v. *United States*,

---

the agreement between the parties concerned a "return" of property in the custody of the government (R. 86, 226) cannot be construed to contradict the specific understanding that the items were deemed stricken from the motion. In view of the grounds of illegality which were being urged (see text above), the stricken items became irrelevant to any issue before the court so that it must have disregarded them, not only with respect to their return to the petitioner, but also with respect to the relationship of their seizure to the legality of the seizure of the remaining items.

353 U. S. 346. We submit that the petitioner, having failed to object to the scope of the seizure in the trial court and having relied exclusively on other grounds in support of his claim that the search of his hotel room and seizure of items found therein were in violation of the Fourth and Fifth Amendments of the Constitution, may not seek reversal of his conviction, obtained on the basis of overwhelming evidence of guilt, by raising the objection initially in this Court. In the absence of a valid objection in a criminal prosecution, the defendant may not raise an objection for the first time on appeal. Rule 51, F. R. Crim. P.; *Az Diu* v. *United States*, 232 F. 2d 283 (C. A. 9), certiorari denied, 352 U. S. 827; *United States* v. *DeMarie*, 226 F. 2d 783 (C. A. 7), certiorari denied, 350 U. S. 966; *Wheeler* v. *United States*, 165 F. 2d 225 (C. A. D. C.), certiorari denied, 333 U. S. 829. Similarly, the failure to make a timely assertion of a constitutional right before a tribunal having jurisdiction to determine it may result in its forfeiture. *Yakus* v. *United States*, 321 U. S. 414, 444–445.

Moreover, the requirement of making timely objection is applicable not only in cases where no objection was raised at the proper time, but also where the objection, though urged at the proper time, did not include the specific ground relied upon on appeal. See 1 Wigmore, *Evidence* (3d ed., 1940) § 18. This principle is, of course, applicable in cases where the legality of searches and seizures have been challenged. Thus, in *United States* v. *Jones*, 204 F. 2d 745 (C. A. 7) certiorari denied, 346 U. S. 854, the defendant made a timely objection, by motion to suppress before

trial, on various specified grounds, to the legality of a search and seizure by government officers incident to an arrest. On appeal, he urged as an additional ground for the illegality of the search and seizure that the officers making the arrest and the search incident thereto had no authority to make the arrest. The Court of Appeals refused to consider this argument, explaining (at p. 749):

> The rule that an appellate court will not notice errors not brought to the attention of the trial court is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. * * *

Cf. *United States* v. *DiRe*, 332 U. S. 581, 588. And, to the same effect, see *Rodriguez* v. *United States*, 80 F. 2d 646, 647–648 (C. A. 5).

This Court has recently had occasion, in a search and seizure case, to decline consideration of "belated contentions" based on a "new theory" urged for the first time in this Court where the facts relied upon by the party suggesting the new theory "were fully known to it at the time of trial, and there are no special circumstances suggesting such an exceptional course." *Giordenello* v. *United States*, 357 U. S. 480, 488. The Court explained that to permit the raising of issues initially at this stage would unfairly deprive the opposing party of an adequate opportunity to respond (*ibid*). Though the *Giordenello* case involved a contention raised by the Government initially before this Court, its principle applies with equal force to the belated objection raised by the petitioner

in the instant case. The petitioner's failure to challenge the validity of the search and seizure, at the hearing on the motion to suppress before trial, on the ground that the seizure was unreasonable because all of his personal effects were "seized" deprived the Government of the opportunity to rebut the contention by cross-examination of the petitioner's witnesses or by offering its own evidence at the hearing to show the actual scope of the seizure. Moreover, assuming the validity of the petitioner's claim, his failure to raise it before or at the trial deprived that court of the opportunity of excluding the evidence allegedly illegally seized and thus of avoiding error. Having failed to do so, we submit that he cannot raise it in this Court and obtain reversal of his conviction on the basis of an alleged error which he himself could have prevented by timely objection.

However, regardless of the untimeliness of the petitioner's objection, there is no basis for the present contention that the seizure was unreasonable because all of his personal effects found in his hotel room were taken with him to I. N. S. headquarters following his arrest; and likewise his new-found reliance on this Court's decision in *Kremen* v. *United States*, 353 U. S. 346, is misplaced.

The *Kremen* case, *supra*, involved the search and seizure of the entire contents of a six-room residence, as an incident of a valid arrest of the defendants. Some of the items seized were introduced at the trial against the defendants. In reversing their convictions, this Court pointed out (at p. 347) that:

> The seizure of the entire contents of the house and its removal some two hundred miles away

to the FBI offices for the purpose of examination are beyond the sanction of any of our cases. * * *

In contrast, the record in this case fails to establish that the bulk of the items which were taken with the petitioner to I. N. S. headquarters by the I. N. S. officers following his arrest were "seized" within the meaning of that term as used in the Fourth Amendment. Rather, the circumstances under which the record reflects that these items were removed from the petitioner's hotel room are shown to have arisen from necessity and the convenience of both the petitioner and the arresting officers.

The petitioner was a transient who, at the time of his arrest, had been living at the Hotel Latham for approximately one month (Ex. 76; R. 657–658). Prior thereto, he had lived at other hotels for short periods of time (Exs. 74, 75; R. 635–636). Shortly after his arrest, I. N. S. officers Schoenenberger, Kanzler, Farley, and Boyle made a "superficial examination" of the petitioner's effects found in his hotel room in order to discover documents relating to his identity and nationality (R. 68, 103). At that time, the petitioner was asked by Kanzler "what he wanted done about his hotel room" (R. 167) and the petitioner, after learning that he was to be taken to I. N. S. headquarters in New York City, replied "Well, I guess I might as well check out of the hotel." (R. 167). Schoenenberger then asked the petitioner whether he wanted to take his personal effects with him (R. 109). The petitioner replied that he did "with some reservations" (R. 109). The I. N. S.

officers thereafter proceeded to assist him in packing his belongings (R. 65, 109). During the course of the packing, the petitioner was allowed to choose—and did choose—what he wanted to take with him and what he wanted to leave behind (R. 109, 112). He discarded certain items without objection by the I. N. S. officers, including some jars of painters' supplies, a handful of pencils, several packages of Kleenex tissue and other articles (R. 109, 114, 242, 663). At one point during the packing, the petitioner asked specifically whether he would be given access to a carton of cigarettes if he took them along and was told by Schoenenberger that he would have access to them and that "[h]e could take anything that he wanted" (R. 112).

The decision to take the bulk of his belongings with him, to check out of the hotel room, and to abandon certain items, was made by the petitioner, *not* the I. N. S. officers. The record fails to indicate that the latter would have taken the bulk of these items had the petitioner desired otherwise. Moreover, it appears from the record that the petitioner was to have access to any of his personal belongings which he desired and that it was not the intent of the officers, in taking them with the petitioner to I. N. S. headquarters, to "seize" all of them.

This conclusion is strengthened by the subsequent actions of the Government and the petitioner's counsel. Two weeks before the hearing on the motion to suppress, the petitioner's counsel was advised by the Government that it was willing to return the bulk of the material involved but was asked by the peti-

tioner's counsel to retain it because the latter had no place to store it (R. 79).

C. EACH OF THE ITEMS INTRODUCED IN EVIDENCE WAS SUBJECT TO SEIZURE DURING A PROPER SEARCH

A total of seven items found in Room 839 of the Latham Hotel were introduced in evidence.[21] Of these, five were seized by the I. N. S. officers during the search which they conducted as an incident to their arrest of the petitioner, and two were seized in the subsequent search of the vacated hotel room by the FBI agents after the petitioner had checked out of the hotel and been transported with his baggage by the I. N. S. officers to the New York headquarters of the I. N. S. It is necessary to discuss these two groups of evidence separately.

(1) *The items seized by the I. N. S. officers during the search incident to the petitioner's arrest*

Of the five items (which became trial exhibits) seized by the I. N. S. officers in the course of their search of the petitioner and his hotel room as an incident of his arrest, four, to use the language of the trial court in denying the motion to suppress (155 F. Supp. 8, 11), "cannot be characterized as other than instrumentalities which were appropriate for employment by the defendant in the preservation of the false

[21] Thus, at the time of the motion to suppress, the petitioner objected to the seizure of the entire list of his personal belongings (R. 20-21). During the course of the proceedings, agreement was reached that dispute existed as to only 26 items (R. 79-90, 225-226, *supra*, p. 48). Of the 26 items which the court refused to order returned or suppressed, the government introduced seven in evidence and it is with respect to these seven that the petitioner's present argument, that their seizure was illegal because they do not relate to the deportation proceeding, relates.

position that he had elected to create and continue to occupy" for the purpose of concealing, by "clandestine coloration," his initial "illegal entry into this country", and his continued "illicit status" herein. These were the two birth certificates in the names of Emil Robert Goldfus and Martin Collins, respectively, the certificate of vaccination in the name of Martin Collins, and the bankbook in the name of E. R. Goldfus (see *supra*, p. 22). The petitioner used these four documents for the purpose of providing himself with a new identity and nationality,[*] thereby concealing his actual identity and nationality, which was essential to the maintenance of his illegal status in this country. These four items, therefore, were properly seizable by the I. N. S. officers under the same general principle which permits arresting officers, when making an arrest on criminal charges, to seize, as an incident of the arrest, "the means and instrumentalities by which the crimes charged had been committed." *Harris* v. *United States*, *supra*, 331 U. S. at 153, 154; *Agnello* v. *United States*, 269 U. S. 20, 30. Certainly, the documents and papers seized were as much instrumentalities and means whereby the petitioner sought to conceal his illegal presence in this country as the ledgers and bills seized in *Marron* v. *United States*, 275 U. S. 192, 193, were instrumen-

[*] Of the two birth certificates, one was forged (R. 717–719) and one was for a child dead over fifty years (Ex. 83; R. 48–49, 678–681). To receive the certificate of vaccination, the petitioner represented himself as Martin Collins (R. 598–599). The identity of Emil Goldfus was used by the petitioner in obtaining the bankbook. The petitioner used both names at different times (*e. g.*, Exs. 71, 72, 73, 74, 75; R. 630–636).

talities of the crime (there involved) of conspiracy to violate the National Prohibition Act. Similarly, in *United States* v. *Lindenfeld*, 142 F. 2d 29, 832 (C. A. 2), it was held that, incident to an arrest for the illegal distribution of narcotics, law enforcement officers lawfully seized cards allegedly showing the names and addresses of the defendant's customers:

> * * * [T]he cards were more than mere evidence of the crime. *They were the means through which defendant hoped to cover up his illegal acts, and thus were a vital factor in the criminal enterprise itself.* * * * [Emphasis added.] [23]

The fifth item found during the search by the I. N. S. officers was the code message taken from the petitioner which he tried secretly to conceal it up his sleeve (see *supra*, pp. 19, 22). This message was subject to seizure on two grounds. First, even under the narrowest interpretation of the legitimate bounds of a proper search incidental to a valid arrest, it is conceded that arresting officers may search the arrested person to prevent the destruction of evidence. *Davis* v. *United States*, 328 U. S. 582, 609; *United States* v. *Rabinowitz*, 339 U. S. 56, 72. Secondly, the message appeared on its face to be an instrumentality of the crime of conspiracy to commit espionage (of which the arresting officers were aware that the peti-

[23] See also *Honig* v. *United States*, 208 F. 2d 916, 920 (C. A. 8), where it was held that, as an incident to a valid arrest for impersonating a federal officer, the seizure of a rubber stamp used to make an imprint on a false identification card was proper on the ground that the stamp was a means used by the defendant to effect his unlawful impersonation.

tioner was suspect). This Court has held that if a search (incident to a valid arrest) is made in good faith for instrumentalities of the offense for which the suspect was arrested, the officers need not ignore material related to other crimes which they come upon. *Harris* v. *United States, supra,* 331 U. S. at 153–155; see also *Kelly* v. *United States,* 197 F. 2d 162, 164 (C. A. 5); *United States* v. *Braggs,* 189 F. 2d 367, 369 (C. A. 10). Although these cases involve the seizure of property possession of which is itself a crime, *i. e.,* contraband, as the Court of Appeals pointed out (258 F. 2d 485, 496–497), there is no reason to distinguish such property from the instrumentalities of an offense, *e. g.,* a murder weapon. Both types of property are subject to seizure in a good faith search for materials related to the offense for which the subject was arrested. And both should be equally subject to seizure when the arresting officers come upon them in a good faith search, even though they relate to a different offense. In the instant case, the seizure of the code message resulted directly from the petitioner's action in attempting to conceal it, and not from any effort of the searching officers to find materials other than documentary evidence of the arrested person's alienage and identity.

(2) *The items seized by the FBI during the later search of the petitioner's vacated room*

Two items were received in evidence which were seized by agents of the FBI during their later search of the petitioner's vacated hotel room with the permission of the hotel management. These were a cipher book and a hollowed-out pencil containing microfilm (see *supra,* pp. 21, 23). These items were taken

from the wastebasket into which the petitioner had voluntarily discarded them after he was given the opportunity to decide which property he wanted to pack and keep and which property he wanted to discard or leave behind. The fact that the petitioner discarded these items into the wastebasket, rather than merely leaving them elsewhere in the room as he did some other items, evidences his desire to be rid of them and his intent to abandon them. As stated by the trial judge (Transcript, p. 437):

> The act of putting them in the scrap basket by an intelligent person, and I am satisfied that this defendant is intelligent is not consistent with the purpose to retain ownership.
>
> He was sufficiently * * * in possession of his reasoning powers, and his faculties to know that if he wished to retain anything the thing to do is to put it in his suitcase; that is what he did with the other things.

See also Transcript, p. 425.

Moreover, the petitioner had permanently vacated the room when the search in which these items were seized was conducted. Although the hotel's "check-out" time was 3 p. m., all that that meant (the evidence is clear) was that the petitioner was entitled to the use of the room until that hour (without incurring an additional day's rent) *if* he retained possession of the key till that time and did not in fact vacate the room by removing all his effects therefrom (*supra*, p. 20). But, as the hotel manager testified, once petitioner paid his bill, turned in his key, and took out his baggage, he was no longer entitled to the room, which was then available to be rented to another guest (R. 659–661).

Since the petitioner had vacated the room, and since the FBI's search of the room was with the specific consent of the hotel management, the search was entirely legal. *Davis* v. *United States, supra,* 328 U. S. at 5983–594; *Reszutek* v. *United States,* 147 F. 2d 142 (C. A. 2). Furthermore, the petitioner had clearly abandoned the items which he discarded into the wastebasket, and it is settled that a person has no standing to object under the Fourth Amendment to the seizure of materials which he has abandoned. *Hester* v. *United States,* 265 U. S. 57; *Haerr* v. *United States,* 240 F. 2d 533, 535 (C. A. 5); *Lee* v. *United States,* 221 F. 2d 29 (C. A. D. C.); *Newingham* v. *United States,* 4 F. 2d 490, 493 (C. A. 3), certiorari denied, 268 U. S. 703.[24]

[24] The petitioner also complains of the subsequent searches, pursuant to search warrants, of two rooms leased by him in the building located at 252 Fulton Street in Brooklyn (Br. 17; Br. App. 44, 45). He states that the search warrants which were issued for the search of these rooms were "[b]ased upon" the two searches of the petitioner's Latham Hotel room (Br. 17). Nothing which was seized in one of the two rooms at 252 Fulton Street (Room 505), however, was received in evidence. With regard to the search warrant authorizing the search of the other room (Room 509), while the affidavit of application (R. 264–266) referred to the petitioner's arrest by I. N. S. officers at the Latham Hotel (R. 265), and, in addition, referred specifically to one of the items taken from the wastebasket of the hotel room during the FBI's search of the room following the petitioner's checking out of the hotel (R. 265), the application also referred, *inter alia,* to the supervening indictment of the petitioner charging him with conspiracy to commit espionage by secreting microfilmed messages in hollowed-out objects such as pencils and coins (R. 264–265). It is thus not at all clear that the validity of this search warrant would necessarily depend upon the validity of the searches of the hotel room. In any event, as we have shown in the text, the searches of the hotel room were not invalid.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

J. WALTER YEAGLEY,
Acting Assistant Attorney General.

WILLIAM F. TOMPKINS,
Special Assistant to the Attorney General.

KEVIN T. MARONEY,
ANTHONY A. AMBROSIO,
Attorneys.

JANUARY 1959.

APPENDIX

8 U. S. C. 1103 (a), 1251 (a) (5), 1252 (a), 1305, and 1306, provide in pertinent part as follows:

§ 1103. *Powers and duties of the Attorney General and Commissioner; appointment and compensation of Commissioner.*

(a) The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers. * * *. He is authorized, in accordance with the civil-service laws and regulations and the Classification Act of 1949, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this chapter; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. * * *

§ 1251. *Deportable aliens—(a) General classes.*

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * * *

(5) has failed to comply with the provisions of section 1305 of this title unless he establishes

to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, * * *.

§ 1252. *Apprehension and deportation of aliens—(a) Arrest and custody; review of determination by court.*

Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. * * *

§ 1305. *Change of address.*

Every alien required to be registered under this subchapter, or who was required to be registered under the Alien Registration Act, 1940, as amended, who is within the United States on the first day of January following the effective date of this chapter, or on the first day of January of each succeeding year shall, within thirty days following such dates, notify the Attorney General in writing of his current address and furnish such additional information as may by regulations be required by the Attorney General. * * *

§ 1306. *Penalties—(a) Willful failure to register.*

Any alien required to apply for registration, and to be fingerprinted in the United States who, willfully fails or refuses to make such application or to be fingerprinted, * * * shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both.

8 C. F. R. 242.2 (a) provides in pertinent part as follows:

> At the commencement of any proceeding under this part, or at any time thereafter and up to the time the respondent becomes subject to

supervision under the authority contained in section 242 (d) of the act, the respondent may be arrested and taken into custody under the authority of a warrant of arrest issued by a district director whenever, in his discretion, it appears that the arrest of the respondent is necessary or desirable. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1966